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SIVARASA K RASIAH

v.

DIRECTOR OF IMMIGRATION SARAWAK & ORS

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HIGH COURT SABAH & SARAWAK, KUCHING
LINTON ALBERT J
[JUDICIAL REVIEW NO: 4-2009-I]
9 JULY 2009

C ***IMMIGRATION:*** *Prohibition against entry - Entry without pass or permit - West Malaysian Member of Parliament refused entry into State of Sarawak - Certiorari, application for leave - Whether there was an arguable case - Whether leave to be granted - Immigration Act 1959/63, ss. 59A, 66(1), 67*

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The applicant, a Member of Parliament from West Malaysia, was refused entry into the State of Sarawak by the first respondent, and presumably also by the second respondent State Secretary of Sarawak, on grounds that he was not entitled to enter the State without a permit or a pass, and further that he had been blacklisted by the State Authority from entering the State. In this application for leave to apply for an order of *certiorari* to quash the impugned decision, the respondents raised the argument that leave ought not to be allowed as: (i) the applicant, having obtained no Permit or Pass to enter Sarawak, was clearly not entitled to enter the State by virtue of s. 66(1) of the Immigration Act 1959/63 ('the Act'); (ii) notwithstanding that s. 67 of the Act had stated that s. 66(1) had no application to "a citizen entering the East Malaysian State for the sole purpose of engaging in legitimate political activity", the applicant had not discharged the burden of proof thereof and therefore could not rely on or take advantage of the said section; and (iii) s. 59A of the Act made it clear that no judicial review could be launched, in the case of an East Malaysian State, against any decision made by "the State Authority in regard to any question relating to compliance with any procedural requirement of this Act …". Before the learned judge, the primary question that arose was whether the applicant, *vide* his application herein, had shown an arguable case as to warrant the court to ventilate the matter on a full *inter partes* basis.

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Held (allowing application):

(1) The application should not be given short shrift and dismissed notwithstanding the strong arguments advanced on behalf of the respondents. Clearly, there is an arguable case in the following aspects of the application, namely: (i) the ouster clause in s. 59A(1) of the Act is referring to decisions made by the State Authority and it is unclear whether the first respondent or the second respondent or both constitute the State Authority; (ii) it is unclear what constitutes the burden of proof required under s. 67 of the Act. Further, to require a Member of Parliament to take along with him for presentation on his arrival at the Kuching International Airport documentary evidence of not only that he is a Member of Parliament but also the legitimate political activities envisaged during his visit to Sarawak would offend common sense and gives an absurd meaning to the relevant statutory provision. (paras 8 & 9)

(2) The court is consequently satisfied that the application for leave is by no means frivolous and that there is clearly an arguable case which ought to be heard on a full *inter partes* basis. (para 10)

Obiter:

(1) The courts must not be seen to be always dismissive of cases where the exercise of powers is challenged by reading into various statutory provisions as giving absolute power where no such power is expressly given. The blacklist may well constitute a grim illustration. (para 10)

Case(s) referred to:

Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors [2006] 1 CLJ 927 CA ***(refd)***

Tuan Haji Sarip Hamid & Anor v. Patco Malaysia Berhad [1995] 3 CLJ 627 SC ***(refd)***

Legislation referred to:

Immigration Act 1959/63, ss. 59A(1), 66(1)(a), (b), (c), (d), 67

Rules of the High Court 1980, O. 53

For the applicant - Baru Bian (See Chee How with him); M/s Baru Bian Advocates

For the respondent - Azizah Nawawi SFC

Reported by Wan Sharif Wan Ahmad

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JUDGMENT

Linton Albert J:

[1] The applicant, a Member of Parliament for the Subang Constituency in Selangor and a Vice-President of Parti Keadilan Rakyat was refused entry into Sarawak on 14 February 2009 when he arrived at the Kuching International Airport and unceremoniously booted out of Sarawak on the same day. He was told by the immigration officer who handled him on his arrival that he had for some undisclosed reasons been placed on the black list and was refused entry into Sarawak on the instruction of the State Secretary. A formal notice was handed over to the applicant and it reads in part as follows:

Notice Of Refusal Of Entry

To Sivarasa AL K Rasiah

This serves to notify you that you are refused entry into the State of Sarawak for:

(a) you do not belong to the State of Sarawak and are not entitled to enter the State without a Permit or a Pass by virtue of section 66 (1) of the Immigration Act, 1959/63;

SGD: for Director of Immigration Sarawak.

[2] This notice was signed by the immigration officer. Hence this application for leave to seek an order of *certiorari* (and other consequential reliefs) to quash the decision of the first respondent pursuant to O. 53 Rules of the High Court 1980.

[3] The principles to be applied on an application for leave are well established. I need refer to two cases of high authority. In *Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors* [2006] 1 CLJ 927 Gopal Sri Ram, JCA laid down at p. 943 as follows:

> To paraphrase in less elegant language what has been said in these cases, the High Court should not go into the merits of the case at the leave stage. Its role is only to see if the application for leave is frivolous. If, for example, the applicant is a busybody, or the application is made out of time or against a person or body that is immunised from being impleaded in legal proceedings then the High court would be justified in refusing leave *in limine*. So too will the court be entitled to refuse leave if it is a case where the subject

matter of the review is one which by settled law (either written law or the common law) is non-justiciable, eg, proceedings in Parliament (see art. 63 of the Federal Constitution).

[4] In *Tuan Haji Sarip Hamid & Anor v. Patco Malaysia Berhad* [1995] 3 CLJ 627 at p 633 an authority cited by learned Senior Federal Counsel, Edgar Joseph, Jr. FCJ, delivering the grounds of judgment of the Supreme Court stated:

> *In R v. Secretary of State for the Home Department, ex p Rukshanda Begum* [1990] COD 107, the Court of Appeal in England correctly laid down guidelines to be followed by the court when considering an application for leave, in the following terms:
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> (i) The judge should grant leave if it is clear that there is a point for further investigation on a full *inter partes* basis with all such evidence as is necessary on the facts and all such argument as is necessary on the law.
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> (ii) If the judge is satisfied that there is no arguable case he should dismiss the application for leave to move for judicial review.
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> (iii) If on considering the papers, the judge comes to the conclusion that he really does not know whether there is or is not an arguable case, the right course is for the judge to invite the putative respondent to attend and make representations as to whether or not leave should be granted. That *inter partes* leave hearing should not be anywhere near so extensive as a full substantive judicial review hearing. The test to be applied by the judge at that *inter partes* leave hearing should be analogous to the approach adopted in deciding whether to grant leave to appeal against an arbitrator's award, … namely: if, taking account of a brief argument on either side, the judge is satisfied that there is a case fit for further consideration, then he should grant leave.

[5] With the confidence that only an enthusiastic counsel can muster, learned Senior Federal Counsel came to the unsolicited aid of the court and turned the application into a full blown opposed *ex parte* application by submitting that the leave application ought to be dismissed because the applicant could not complain as clearly he was not entitled to enter Sarawak by virtue of s. 66(1) of the Immigration Act 1959/63 (Revised 1974) which states:

A Subject to subsection (2) and to sections 67 and 68, a citizen shall not be entitled to enter an East Malaysian State without having obtained a Permit or Pass in that behalf unless:

...

B **[6]** It was not suggested that the applicant came within any of the categories exempted from the prohibition under s. 66(1)(a), (b), (c) and (d) of the Act, or that he had obtained a Permit or Pass to enter Sarawak. Therefore, the learned Senior Federal Counsel submitted that the applicant was clearly not entitled to enter C Sarawak. Learned Senior Federal Counsel added that the applicant cannot rely on s. 67 of the Act which states:

Subsection 66(1) shall not have effect in relation to a citizen entering the East Malaysian State for the sole purpose of engaging in legitimate political activity; but the burden of proof that a person D is entitled to enter the East Malaysian State under this section shall lie on him.

[7] It was argued that this was so because the applicant's statement and affidavit in support of the application did not disclose E any facts to show that the applicant had discharged the burden of proof. Learned Senior Federal Counsel further relied on s. 59A of the Act which states:

(1) There shall be no judicial review in any court of any act done or any decision made by the Minister or the Director General, F or in the case of an East Malaysian State, the State Authority, under this Act except in regard to any question relating to compliance with any procedural requirement of this Act or the regulations governing that act or decision.

G (2) In this section, 'judicial review' includes proceedings instituted by way of:

(a) an application for any of the prerogative orders of *mandamus*, prohibition and *certiorari*;

H (b) ...

(c) ...

(d) ...

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[8] With respect, I do not think that in these circumstances, the application should be given short shrift and dismissed notwithstanding the strong arguments advanced on behalf of the respondents because clearly, there is an arguable case in the following aspects of the application. Firstly, the ouster clause in s. 59A(1) of the Act refers to decisions made by the State Authority and it is unclear whether the Director of Immigration the first respondent or the State Secretary the second respondent or both constitute the State Authority which would then justify the invocation of that ouster clause.

[9] Secondly, and more importantly, it is unclear what constitutes the burden of proof required under s. 67 of the Act. Surely no self-respecting Member of Parliament would relish the prospect of having to take along with him for presentation on his arrival at the Kuching International Airport documentary evidence of not only that he is a Member of Parliament but also the legitimate political activities envisaged during his visit to Sarawak. Such a requirement would, in my view, offend common sense and gives an absurd meaning to the relevant statutory provision.

[10] On the authorities aforesaid, I do not think it is either necessary or appropriate to embark on a judicial determination of the merits of the respective arguments advanced on behalf of the parties or set out a host of other issues that may fall to be determined *inter partes* but suffice that at this stage, and in the circumstances I have set out, I am satisfied that the application for leave is by no means frivolous and that there is clearly an arguable case which ought to be heard on a full *inter partes* basis. In conclusion it is perhaps not inappropriate to state that in the forefront of my mind is the notion that the courts must not be seen to be always dismissive of cases where the exercise of power is challenged by reading into various statutory provisions as giving absolute power where no such power is expressly given because absolute power corrupts absolutely. The blacklist may well constitute a grim illustration.

[11] The application is for the reasons aforesaid allowed with costs in any event. I shall now proceed to fix a date for the *inter partes* hearing of the substantive application.